Supreme Court, U.S.
FILED
NOV 23 2015
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 14-1280

# In the Supreme Court of the United States

JEFFREY J. HEFFERNAN,
*Petitioner,*

v.

CITY OF PATERSON, ET AL.,
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONER

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## QUESTIONS PRESENTED

Whether Respondents violated Petitioner's right to freedom of assembly under the First Amendment.

Whether Respondents violated Petitioner's right to engage in speech activities in concert with others.

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## INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a nonprofit law firm dedicated to the free expression of all religious traditions. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among many others, in lawsuits across the country and around the world.

The Becket Fund frequently represents religious people who seek to vindicate their constitutional rights against government overreach, both as individuals or in community with others. See, *e.g.*, *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015); *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694 (2012). In particular, the Becket Fund has long sought to vindicate the rights of people of all faiths to assemble together for worship. See, *e.g.*, *Islamic Center of Murfreesboro* v. *Rutherford Cty., Tenn.*, No. 3:12-cv-738 (M.D. Tenn., complaint filed July 18, 2012); *Elijah Group, Inc.* v. *City of Leon Valley*, 643 F.3d 419 (5th Cir. 2011); *Congregation Kol Ami* v. *Abington Twp.*, 2004 WL 1837037 (E.D. Pa. 2004); *Hale O Kaula Church* v. *Maui Planning Comm'n*, 229 F. Supp. 2d 1056 (D. Haw. 2002).

The Becket Fund is concerned that—if the Third Circuit's decision is allowed to stand—the ability of religious people to engage in religious activity in con-

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[1] No counsel for a party authored any portion of this brief or made any monetary contribution intended to fund the preparation or submission of the brief. Consents to the filing of this brief are on file with the Clerk.

cert with one another will be wrongly limited. It therefore advocates that the Court re-root the jurisprudence of collective rights in the text and history of the First Amendment.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Third Circuit's determination that the outlandish behavior of Respondents did not violate the Constitution is a symptom of a deeper problem lurking within First Amendment doctrine: Courts often don't know what to do about collective rights because they lack the proper tools to address certain claims.

Indeed, the Third Circuit reached the obviously flawed result at issue here precisely because the court felt constrained to choose only between a watered-down "freedom of association" unmoored from the history and text of the First Amendment, or an individual-focused speech claim that overlooks the collective dimensions of speech. See Pet. App. 10a (association claim failed because "Heffernan * * * did not have any affiliation with the campaign other than the cursory contact necessary for him to pick up the sign for his mother"); *ibid.* (holding that speech claim required a "find[ing] that Heffernan intended to convey a political message when he picked up the sign at issue"). In essence, the court reviewed Heffernan's First Amendment claims solely through the prism of his individual activity, rather than his activity in concert with others. But government defendants can often defeat constitutional rights if they are allowed to slice the protected activity into its constituent parts and analyze each part separately, rather than analyzing the activity as a whole and in context.

See, *e.g.*, *Hosanna-Tabor*, 132 S. Ct. at 709 ("The issue before us, however, is not one that can be resolved by a stopwatch."). Constitutional freedoms are not meant to be measured out by coffee spoons, but that is precisely what the Third Circuit did here. It treated the associational claim as a matter of whether Officer Heffernan had meant to associate with the political campaign as opposed to the question of whether he had engaged in the First Amendment protected right of assembling with others, regardless of his purpose or expression for that assembly.

Perhaps the surest sign that First Amendment doctrine has gone astray is that the Third Circuit could conclude that in this case there was no First Amendment protected conduct at all. Pet. App. 13a ("To paraphrase our colleague, Judge Roth, 'a [First Amendment] claim depends on [First Amendment protected conduct], and there was none in this case.'") (quoting *Pro* v. *Donatucci*, 81 F.3d 1283, 1292 (3d Cir. 1996) (Roth, J., dissenting)) (alterations in original). When a federal court can see no First Amendment conduct when a citizen assembles with other people and picks up a political campaign sign for another who wishes to display it, that is not mere error—that is a symptom of a doctrinal problem. That doctrinal problem results from a disconnect between existing jurisprudence concerning collective rights and the text and history of the First Amendment. The First Amendment contains at least two categories of protections for collective rights, both of which have gotten less attention than they ought.

The first category is obvious from the text: "the right of the people peaceably to assemble." U.S.

CONST. amend. I. The right to assemble with others—at least if one relies on the text of the Constitution—should be a standalone right, rather than one that is merely derivative of or auxiliary to other rights.

Yet as the scholarship of Professor John Inazu has demonstrated, the freedom of assembly has been "forgotten," replaced by a jurisprudence of freedom of association that is a poor substitute for the full spectrum of protections that naturally inhere in the historic freedom of assembly the Founders put into the First Amendment. Freedom of association as applied by the lower courts is a particularly weak protection because it tends to be preceded by adjectives—"political," "intimate," "expressive"—that limit its scope, and because those rights are interpreted in a way that is oddly separate from other parts of the Constitution. Lower courts would do better to rely on the specific, textual right set out in the Constitution.

The second category of collective rights derives from the very nature of the rights protected by the Constitution. In many cases collective rights are so bound up with and integral to a particular protection that it is impossible to conceive of the right properly without including the collective dimension. For instance, freedom of speech can be exercised by both individuals and groups, and it would mean little without the ability to speak to an audience. Similarly, freedom of the press is both an individual right and a collective right, and it makes no sense if no one is allowed to read newspapers.

In the context of freedom of religion, the necessarily collective dimension of religious exercise is particularly obvious: One can't make a minyan, per-

form a baptism, preach a sermon, conduct *jum'ah* prayers, or take *amrit* without involving more than one person. The right to group religious exercise is one that is enjoyed both by the group itself and by the individual who is part of the group. The church has a right to give the sermon, but the parishioner has a right to hear the sermon too. By contrast, "freedom of religion" reduced to an entirely individual right would be nothing like the freedom of religion protected by the Founders.

As described below, that more robust understanding of the nature of collective rights reflects the understanding at the time of the Founding, as well as the decisions of this Court since the Founding. It also mirrors the provisions of international human rights instruments, such as the International Covenant on Civil and Political Rights (ICCPR), which is careful to protect the right of religious freedom "either individually or in community with others." ICCPR art. 18.1, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171. Yet the lower courts, like the Third Circuit here, have at times been confused about how those rights play out in practice, in part because they have made the right too monistic, focusing on the individual in a vacuum rather than the right of the individual to engage in activities in concert with others.

*Amicus* suggests that the solution to that confusion is to return collective rights to their textual and historical basis in the Constitution. An understanding that collective rights are both expressly protected by the Assembly Clause and integrally protected by other express protections in the Bill of Rights would

take the lower courts a long way toward a jurisprudence that reflects both our constitutional tradition and modern realities.

For the Court to undertake such a move toward text and history would hardly be unusual. In recent decades, this Court has undertaken an extensive program of re-rooting other parts of the Bill of Rights into the text and history of the Constitution, including the First, Second, Fourth, Fifth, Sixth, and Fourteenth Amendments. In all of these areas, the Court routinely looks to both the text and the historical meaning of key constitutional terms. See, *e.g.*, *Apprendi* v. *New Jersey*, 530 U.S. 466, 478 (2000) (examining "the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding"); *Crawford* v. *Washington*, 541 U.S. 36, 43-44 (2004) (examining "the historical background of the [Sixth Amendment's Confrontation] Clause to understand its meaning"); *District of Columbia* v. *Heller*, 554 U.S. 570, 598 (2008) (examining "the history that the founding generation knew" to interpret the Second Amendment) and *id.* at 642 (Stevens, J., dissenting); (examining "contemporary concerns that animated the Framers"); *United States* v. *Jones*, 132 S. Ct. 945, 950 & n.3 (2012) (examining the "original meaning of the Fourth Amendment," because "we must assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted") (citations omitted); *Hosanna-Tabor*, 132 S. Ct. at 702-4 (2012) (describing historical problems with English governmental control of church bodies and concluding "[i]t was against this background that the First Amendment was adopted");

*Horne* v. *Dep't of Agric.*, 135 S. Ct. 2419, 2426 (2015) (discussing Takings Clause in light of Magna Carta).

Yet without such a move toward text and history, freedom of assembly will remain a forgotten byway of constitutional law, and the collective dimension of many constitutional rights will remain overlooked. The Court should take the opportunity afforded by this case to remember the Assembly Clause and to put the entire set of collective rights on a firmer textual and historical foundation.

## ARGUMENT

### I. The Constitution protects collective rights.

As we demonstrate below, the Constitution is designed to protective collective freedoms—both of the group and of the individual acting within the group—by various means. Two of those means are the Assembly Clause and the collective dimension of rights such as freedom of speech, free exercise of religion, and freedom of the press.

#### A. Freedom of assembly is a standalone right under the First Amendment.

The Constitution recognizes "the right of the people peaceably to assemble." U.S. CONST. amend. I. Throughout American history, this right has protected both assemblies that advance the status quo and those that challenge it. Although it is sometimes conceived of as an emanation of other rights like speech or religion, the right of assembly has independent force, reflected in its specific enumeration in the First Amendment. The Founders understood what despots everywhere have long known: if the state can keep people from assembling, the state can prevent every

other fundamental freedom from ever truly challenging the status quo.

Yet as Professor Inazu has demonstrated in both his pathbreaking article *The Forgotten Freedom of Assembly* and his subsequent book *Liberty's Refuge*, freedom of assembly has been "forgotten."[2] The freedom of assembly protected by the Founders has been replaced with the far weaker "freedom of association" that is constitutionally both atextual and ahistorical. As Professor Michael McConnell has argued:

> The Supreme Court refers to "freedom of association" even though those words do not appear in the First Amendment. Professor John Inazu persuasively argues that freedom of association is derived from freedom of assembly, but the Court appears to derive the right as one "implicit" in the freedom of speech.

Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 Harv. J.L. & Pub. Pol'y 821, 825 (2012).

*Amicus* believes that freedom of assembly should be unforgotten. That will both avoid absurd results like the one in this case and also protect more people across the run of cases in the lower courts.

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[2] See John D. Inazu, *The Forgotten Freedom of Assembly*, 84 Tul. L. Rev. 565 (2010); John D. Inazu, *Liberty's Refuge: the Forgotten Freedom of Assembly* (2012) (Inazu, *Liberty's Refuge*).

### 1. The broad right of assembly creates crucial space for political and social dissent.

When adopting the First Amendment, the Founders considered and rejected the idea that, in order for an assembly to be protected, it had to serve the "common good." Inazu, *Liberty's Refuge* at 21-22. The decision to adopt a broad right of assembly has had momentous consequences for American civic life. The Democratic-Republican Societies that organized grassroots political opposition to President Washington and the Federalists relied on the right of assembly, as did the women suffragists and abolitionists who stared down pro-Union rioters in the years before the Civil War. See *id.* at 25-28, 32-35. The right to assemble without having to show that your assembly furthered a court's or bureaucrat's idea of the "common good" provided crucial protection for these early groups and set the stage for the decades that followed.

At the First Congress, all of the early drafts of the First Amendment limited protection to assemblies that served the "common good." Inazu, *Liberty's Refuge* at 21-22. But during the House debates, Elbridge Gerry of Massachusetts argued that if it were "supposed that the people had a right to consult for the common good" but "could not consult unless they met for that purpose," the amendment would protect nothing. *Id.* at 22. The phrase "for their common good" was eventually dropped from the Senate ver-

sion of the amendment.[3] *Ibid.* Thus the final text protects peaceful assemblies whether or not government officials believe that the gathering will serve the common good.[4]

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[3] As Prof. Inazu points out, some have argued that freedom of assembly is limited to gatherings connected with government petitions. See Inazu, *Liberty's Refuge* at 23 (quoting Jason Mazzone, *Freedom's Associations*, 77 Wash. L. Rev. 639 (2002)). Inazu explains how the text of the actually-adopted version of the First Amendment does not support this view. See Inazu, *Liberty's Refuge* at 21-25. The Congressional debate surrounding the final text also shows that the Founders understood free assembly to protect all kinds of lawful gatherings—including religious meetings like William Penn's open air religious service—and that the right to assemble and the right to petition were thus separate rights. See *id.* at 23-24.

[4] Much of the confusion around the scope of assembly appears to come from dicta in the dubious *United States* v. *Cruikshank*, 92 U.S. 542 (1875). In the course of holding that the First Amendment did not guarantee the right of assembly against infringement by private actors, the court remarked that "[t]he right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the national government, is an attribute of national citizenship." *Id.* at 552. Eleven years later, in *Presser* v. *People of State of Illinois*, the court quoted just the first half of this statement in *Cruikshank* and concluded on that basis that "the right peaceably to assemble was not protected by the clause referred to, unless the purpose of the assembly was to petition the government for a redress of grievances." 116 U.S. 252, 267 (1886). But later cases have adopted a far broader view of

The founding generation lost no time in using this right to challenge the political status quo: between 1793 and 1796 dozens of Democratic-Republican Societies were organized in most of the major cities in the United States by farmers and laborers unhappy with George Washington's administration. See Inazu, *Liberty's Refuge* at 25 & nn.11, 12. These societies, which organized public celebrations that included women, the poor, and enslaved people, "invariably" relied on the right of assembly. *Id.* at 25-26. Perhaps unsurprisingly, President Washington strongly opposed these societies, questioning their right to exist and linking them to the violent Whiskey Rebellion. *Id.* at 27-28. Although the movement eventually died out, it laid the groundwork for a major shift in power with the subsequent defeat of the Federalists and rise of Thomas Jefferson. See *id.* at 28-29. And it is simple to see how language that protected only assemblies that served the "common good" could have been used to nip them in the bud.

A limitation for the "common good" would likewise have rendered the right of assembly useless for the other groups that benefitted significantly from its protection in the 19th Century: abolitionists and suffragists. Because many of these activists were women, "freedom of assembly was indelibly linked with the women's rights movement." Inazu, *Liberty's Refuge* at 32 (quotation omitted). Throughout the 19th

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the right of assembly. See, *e.g.*, *Heller*, 554 U.S. at 591; *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945); see also Inazu, *Liberty's Refuge* at 38-40 (discussing *Cruikshank* and *Presser*).

Century, women abolitionists and suffragists organized meetings and conventions challenging the political and economic status quo—culminating in the famous 1848 convention in Seneca Falls, New York. See *id.* at 32-33. The abolitionist meetings in particular were deeply unpopular in the decades before the Civil War: rioters defending "Union" and opposing abolition tried to lynch abolitionist William Lloyd Garrison in Boston in 1835 and in 1837 burned down the Philadelphia hall where the Convention of American Women Against Slavery was meeting. See *id.* 34-35. Against this background of deep political division and civil unrest, a decree denying abolitionists the right to assemble on the ground that their opposition to slavery threatened the "common good" of national union practically writes itself. Fortunately for the abolitionists, and for human rights, the First Amendment contains no such limitation.

**2. The independent right of assembly is necessary to adequately protect the other fundamental rights in the First Amendment.**

Despite its importance to early Americans, today the right of assembly is largely neglected, with cases that would fit naturally under "the right of the people peaceably to assemble" being brought instead under the freedom of association that has been held to emanate from other guarantees in the First Amendment. This anomaly is largely the legacy of mid-century debates about how to best incorporate the First Amendment against the states, and it is not without cost. It introduces an unnecessary layer of complexity to the legal analysis. Returning the right

of association to its textual and historical roots in freedom of assembly would help bring simplicity and clarity to this area of the law without sacrificing crucial protections.

But is an independent right of assembly really necessary? The Founders grappled with this question too. During the First Congress, Theodore Sedgwick of Massachusetts argued that freedom of assembly was redundant with freedom of speech and therefore unnecessary. See Inazu, *Liberty's Refuge* at 23. He was rebuffed when John Page of Virginia referred obliquely to William Penn, the Quaker leader who was arrested and tried for holding an open-air worship meeting in London. See *id.* at 23-24. Congressman Page pointed out that without the right to assemble, every other right in the First Amendment could be rendered meaningless by government officials that had too often shown (in Penn's case and others) a willingness to suppress lawful assemblies. After his speech, Congressman Sedgwick's motion to strike the amendment was voted down "by a considerable majority," and assembly entered the First Amendment as an independent right. *Id.* at 24.

Page's words were tragically prophetic because in the years before the Civil War, Southern states systematically stripped free African-Americans of their right of assembly. An 1800 South Carolina law forbade enslaved people and free African-Americans from assembling for "mental instruction or religious worship." Inazu, *Liberty's Refuge* at 31. An 1831 Virginia law made all meetings of free African-Americans "at any school house, church, meeting house, or other place for teaching them reading or

writing, either in the day or night" unlawful. *Ibid.* Following Nat Turner's 1831 rebellion, states made the restrictions even harsher. "By 1835, most southern states had outlawed the right of assembly and organization by free blacks" and "prohibited them from holding church services without a white clergyman present." *Ibid.* After the Civil War, organized groups of domestic terrorists like the Ku Klux Klan used violence and intimidation to prevent African-Americans from exercising any of their constitutional rights, including especially their right of assembly.[5]

These tragic examples prove the Founders' wisdom: repressive regimes rely on assembly restrictions to keep other fundamental rights in check. An express constitutional right of assembly stops the march of repression early, before it has reached the doorway of a private home or the inner sanctum of individual conscience.

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[5] Inazu, *Liberty's Refuge* at 36-38. Perhaps the most notorious of these incidents is the Colfax Massacre of 1873, in which a group of white supremacists slaughtered African-Americans who had surrendered after defending Republican officials they helped to elect. See *id.* at 37-38. Among other things, federal prosecutors charged the suspects with preventing African-American citizens from enjoying their right of assembly. Out of 100 men prosecuted for the massacre, only three were convicted—and their conviction was overturned when the Supreme Court concluded that the federal right of assembly did not protect against infringements by private citizens. See *ibid.*; *Cruikshank*, 92 U.S. at 542.

Fortunately, as the twentieth century dawned, the freedom of assembly enjoyed a renaissance, as labor organizers increasingly took advantage of its protection to argue for, and achieve, greater rights. See Inazu, *Liberty's Refuge* at 51. By 1939, "assembly joined religion, speech, and press as one of the 'Four Freedoms' celebrated at the New York World's Fair," and journalists hailed assembly as "the most essential right of the four," because it was necessary to fully exercise the other three. *Id.* at 54-55.[6] Later the same year, the Supreme Court used the right of assembly to rule against a New Jersey mayor who refused to let a labor group hold public meetings in his city. See *Hague* v. *Comm. for Indus. Org.*, 307 U.S. 496, 501 (1939). Six years later this Court reaffirmed the right in another labor case, this time involving a union organizer prevented from giving a speech in Texas. See *Thomas* at 530-31. In short, by the 1940s, the right of assembly appeared firmly fixed as the fourth column of the First Amendment.

In 1958, however, the Court moved away from the textually-grounded right of assembly and toward a "right of association" arising out of the right to free speech. In *NAACP* v. *Alabama ex rel. Patterson*, a unanimous Court held that it was "beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable as-

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[6] Pictures of the Leo Friedlander statues of the Four Freedoms at the World's Fair can be seen here: 1939 New York World's Fair, *The Four Freedoms*, Theme Center Statues http://www.1939nyworldsfair.com/worlds_fair/wf_tour/statues/4-freedoms.htm (last visited Nov. 23, 2015).

pect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." 357 U.S. 449, 460 (1958). This apparent unanimity masked significant internal debate over where the new right of association was located—in the First or Fourteenth Amendment. See Inazu, *Liberty's Refuge* at 81-83. Perhaps the Court used "association" rather than "assembly" because *Patterson* involved the NAACP's fight to keep its membership records private, while assembly connoted a public gathering. But whatever the reason, in the following decades the Court applied the new right of association unevenly—routinely vindicating the rights of the NAACP, while rejecting most cases involving communist groups.[7] The trend became so pronounced that Harry Kalven proclaimed "The Communists cannot win, the NAACP cannot lose." *Virtual Assembly*, 98 Cornell L. Rev. at 1116.

Lacking a clear textual anchor, the right of association continued to evolve in the 1980s and 1990s, when the Court began to distinguish between "intimate association," safeguarded as a "fundamental element of personal liberty," and "expressive associa-

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[7] John Inazu, *Virtual Assembly*, 98 Cornell L. Rev. 1093, 1116 & nn.107, 108 (2013) (comparing *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U.S. 293, 296 (1961); *Shelton* v. *Tucker*, 364 U.S. 479, 485–86 (1960); *Bates* v. *City of Little Rock*, 361 U.S. 516, 523 (1960); *Patterson*, 357 U.S. at 460 with *Communist Party of the U.S.* v. *Subversive Activities Control Bd.*, 367 U.S. 1 (1961); *Barenblatt* v. *United States*, 360 U.S. 109 (1959); *Uphaus* v. *Wyman*, 360 U.S. 72 (1959)).

tion," which was "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 617-18 (1984). In the 1983 case *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983), the Court effectively merged free speech and assembly rights into a single analysis—a move followed in later cases like *Boos* v. *Barry*, 485 U.S. 312, 318-19 (1988). As a result of this realignment, cases in which the government's action would hinder the group in communicating a message its members came together to express tended to win (*Boy Scouts of Am.* v. *Dale*, 530 U.S. 640 (2000)), while groups that failed to demonstrate such an impact on their message tended to lose (*Roberts*, 468 U.S. at 621-22).

Throughout this process, freedom of assembly has remained on the sidelines. Indeed, this Court has not decided a freedom of assembly claim in over thirty years. See Inazu, *Liberty's Refuge* at 7 & n.15. And that is a loss, because as we have seen, the right of assembly has provided crucial protection for dissenting and marginalized groups in the past, and could do so again. This Court should take the opportunity presented by this case to re-establish its association jurisprudence on the firmer doctrinal foundation of the Assembly Clause.

### B. Many freedoms protected in the Bill of Rights have collective dimensions that are just as protected as their correlate individual rights.

Aside from the standalone right of assembly, many other fundamental liberties contained in the Bill of Rights have an important collective dimension, either exercised through members of groups as individuals or through the group institution itself. "At first glance, the idea of collective rights may appear to be at odds with the liberal tradition, with its strong emphasis on individual rights. Yet the liberal tradition has a communitarian dimension that is generally overlooked."[8] Indeed, scholars have argued that certain collective rights, or the collective exercise of rights, are valuable because they provide options necessary for personal autonomy. Joseph Raz, *Morality of Freedom*, 205-206 (1986). In other words, recognizing the inherent collective dimension of fundamental rights is important not just for protecting the fundamental rights of groups of people, but also in order to provide the greatest possible protection of individual liberty.

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[8] Steven J. Heyman, *Ideological Conflict and the First Amendment*, 78 Chi.-Kent L. Rev. 531, 571 (2003).

### 1. As a practical matter many rights can only be fully exercised if the inherent collective dimension of the right is protected.

As a practical matter, the Bill of Rights contains a number of liberties that "can be fulfilled only on the precondition that certain collective interests are also rights." Dwight Newman, *Collective Interests and Collective Rights*, 49 Am J. of Jur. 127, 158 (2004).[9] In other words, unless we are prepared to abandon critical aspects of many fundamental liberties, the collective dimension of such liberties must also be protected. *Id.* at 162-63.

For example, scholars have recognized that "any reasonable understanding of the moral right to freedom of religion must encompass its collective dimension." Newman, 49 Am J. of Jur. at 159-160. Freedom of religion has not been consigned to the "right of an individual to go into a closet and worship alone." *Id.* at 160 (quoting Vernon Van Dyke, *Collective Entities and Moral Rights: Problems in Liberal-Democratic Thought*, 44 Journal of Politics 21, 27 (1982)); *see also* Johan D. van der Vyver, *The Relationship of Freedom of Religion or Belief Norms to Other Human Rights*, *in* Facilitating Freedom of Religion or Belief: A Deskbook 85, 87 (Tore Lindholm et al., eds., 2004) (van der Vyver) ("Freedom of religion or belief cannot prosper on its own: it requires protection of collateral

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[9] See also Dwight Newman, *Community and Collective Rights: A Theoretical Framework for Rights Held by Groups* (2011).

rights such as freedom of expression and of assembly.").

In fact, a view of religious exercise focused exclusively on the individualistic nature of religion would denigrate a variety of faith traditions which emphasize communal worship or other communal religious activities. Newman, 49 Am J. of Jur. at 160 (citing Charles Taylor, *Varieties of Religion Today: William James Revisited* (2002)). One cannot make a minyan, perform a baptism, preach a sermon, conduct Friday *jum'ah* prayers, or take *amrit* without involving more than just one person. Similarly, in many Native American faith traditions, adherents frequently gather together for prayers and rituals. See Kristen A. Carpenter, *Real Property and Peoplehood*, 27 Stan. Envtl. L.J. 313, 337 (2008). As an illustration, the "entire community participate[s]" in the Hopi Katsinam ceremonies." *Id.* at 373. Thus, the "the individual right to freedom of religion presupposes the fulfillment of certain collective interests of religious collectives." Newman, 49 Am J. of Jur. at 161.

The collective dimension to rights in the Bill of Rights is by no means limited to the free exercise of religion. For instance, "[a]n individual's freedom of speech presupposes a societal context where speech can matter." Newman, 49 Am J. of Jur. at 161.[10] "An

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[10] See also Heyman, 78 Chi.-Kent L. Rev. at 573 ("[F]ree speech itself has traditionally been understood in part as a right of the community as a whole. * * * [I]n the eighteenth-century libertarian tradition, free speech was not only an inalienable right of individuals, it was also a right that the people as a whole retained when they established a government—a right that was essential if they were to

individual right to vote presupposes the relevant community's ability to be self-determining * * *." *Ibid.* And other rights, such as the right to counsel or the right to a jury, by definition cannot be exercised without more than one person involved.

These examples demonstrate that "[c]ertain individual rights thus cannot be separated from collective rights. Rights are interdependent." Newman, 49 Am. J. Juris. at 162. As such, "*some* collectivity necessarily has to have a collective right if we are to make sense of certain individual rights." *Ibid.*

### 2. This Court has consistently recognized the collective dimension inherent in many fundamental rights.

This Court has consistently recognized the collective dimension of fundamental rights in at least two contexts: 1) rights exercised by individuals in concert with others, and 2) rights exercised by institutions or groups themselves.[11]

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supervise the government and to exercise their own political rights within a representative system.").

[11] van der Vyver at 90 ("A distinction should be made * * * between collective group rights and institutional group rights. A *collective group right* is afforded to individual persons belonging to a certain category, such as children, women, or ethnic, religious and cultural minorities. The right of a religious community to peaceful assembly, freedom of association, freedom of expression, and freedom of thought, conscience and religion thus belongs to every member of the group and can be exercised separately, or jointly with any other member(s) of the group. * * * Whereas a collective group right vests in individual mem-

### a. This Court has protected individual rights exercised collectively in concert with others.

Many of this Court's precedents implicitly recognize the collective dimension of rights exercised by individuals in concert with others. For example, in *Wisconsin* v. *Yoder*, this Court protected the right of an Amish community to educate their children within their community, rather than be subject to the compulsory school attendance law. 406 U.S. 205 (1972). The *Yoder* plaintiffs were "members of the Old Order Amish religion." *Id.* at 207. The Court spent time analyzing the "way of life" of the Amish collective, and the way in which the law at issue would disrupt the formation of "the Amish religious community." *Id.* at 210-12. Indeed, this Court's holding was explicitly based both on the individualistic "psychological harm to Amish children," as well as the risk of the "destruction of the Old Order Amish church community as it exists in the United States today." *Id.* at 212. The reasoning in *Yoder* thus recognized that the free exercise rights at issue were necessarily being exercised by individuals as members of a collective, and protecting the collective dimension of the rights was necessary to fully protect individual rights.

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bers of a community of people bound together by, for example, a particular national or ethnic, linguistic, or religious allegiance, an *institutional group right* vests in a social institution as such and can only be exercised by that collective entity through the agency of its authorized executive organs.").

And in *Watchtower Bible & Tract Society of New York, Inc.* v. *Village of Stratton*, this Court held that an ordinance prohibiting door-to-door solicitation violated the First Amendment of speech, freedom of the press, and religious exercise for a group of Jehovah's Witnesses. 536 U.S. 150, 153, 166-69 (2002). This Court observed that the city's ordinance created a burden for many types of groups, including religious groups, labor organizations, and any of "the poorly financed causes of little people" who sought "the dissemination of opinion" at "the homes of the people." *Id.* at 162-63. Thus, the collective nature of these First Amendment rights, which required the audience available through door-to-door canvassing, was determinative in this Court's decision.

These precedents illustrate this Court's recognition that to afford full protection to many of the fundamental liberties set forth in the Bill of Rights, courts must protect the collective exercise of those rights by individuals as members of groups.

**b. This Court has protected collective rights exercised by private institutions.**

In addition to recognizing the collective dimension of rights exercised by individuals as a member of a group, this Court has also recognized the collective dimension of rights exercised by institutions or groups as a stand-alone entity. For example, in *Kedroff* v. *St. Nicholas Cathedral*, this Court recognized "a spirit of freedom for religious organizations" that included "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." 344 U.S. 94, 116 (1952). As one scholar explained,

> The heart of the pluralistic thesis [in *Kedroff*] is the conviction that government must recognize that it is not the sole possessor of sovereignty, and that private groups within the community are entitled to lead their own free lives and exercise within the area of their competence an authority so effective as to justify labeling it a sovereign authority.[12]

This Court recently reaffirmed the longstanding principle that the First Amendment prohibits government interference "with the internal governance of the church," or "the church of control over the selection of those who will personify its beliefs." *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *E.E.O.C.*, 132 S. Ct. 694, 706 (2012). Justice Alito and Justice Kagan noted that such protection is justified in part because throughout history, "religious bodies have been the preeminent example of private associations that have acted as critical buffers between the individual and the power of the State." *Id.*

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[12] Mark DeWolfe Howe, *Foreword: Political Theory and the Nature of Liberty*, 91 Harv. L. Rev. 67, 91 (1953); see also *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 708-09 (1976); *Maryland & Virginia Eldership of Churches of God* v. *Church of God at Sharpsburg, Inc.*, 396 U.S. 367 (1970); *Presbyterian Church* v. *Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S. 440, 449 (1969); *Gonzalez* v. *Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929); *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679 (1871).

at 712 (Alito, J. concurring) (internal quotation marks and brackets omitted).

In addition to religious freedom, courts have recognized that private institutions enjoy a wide range of additional constitutional rights, including the freedom of speech,[13] the Fourth Amendment right to be free from unreasonable searches and seizures,[14] a Fifth Amendment right against double jeopardy[15] and takings,[16] a Sixth Amendment right to counsel,[17] and a Seventh Amendment right to a jury.[18] Indeed, under our constitutional framework this Court has explained that courts should begin by assuming that a right applies to private institutions, and only refrain from providing protection if the right is so "purely personal" that an exception applies. *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 778 n.14 (1978).

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[13] *Pacific Gas and Electric Co.* v. *Public Utilities Comm'n of California*, 475 U.S. 1, 16 (1986).

[14] *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 311 (1978).

[15] *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 565, 575 (1977).

[16] *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481, 489 (1931).

[17] *United States* v. *Rad-O-Lite of Philadelphia, Inc.*, 612 F.2d 740, 743 (3d Cir. 1979).

[18] *Ross* v. *Bernhard*, 396 U.S. 531, 532–33 (1970); *United States* v. *R.L. Polk & Co.*, 438 F.2d 377, 378-80 (6th Cir. 1971).

### 3. International human rights instruments and precedents—including those the United States is party to—protect the collective exercise of human rights.

International human rights law also regularly recognizes the collective dimension inherent in various human rights, both as a collective group right and at the institutional level.

#### a. International human rights law protects individual rights exercised collectively in concert with others.

The standard-setting international norm on freedom of religion or belief is found in Article 18 of the Universal Declaration of Human Rights (UDHR), 1948, which provides:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or *in community with others* and *in public* or private, to manifest his religion or belief in teaching, practice, worship and observance.[19]

Under this instrument, an individual's right to religious freedom includes the right "to associate * * * with the institutional structures of one's religion." van der Vyver at 87.

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[19] Universal Declaration of Human Rights, art. 18, G.A. Res. 217A, U.N. GAOR, 3rd. Sess., Pt. 1, at 71, U.N. Doc. A/810 (1948) (emphases added) (UDHR).

The ICCPR, the leading international human rights treaty to which the United States is a party, likewise protects the "freedom, either individually *or in community with others and in public or private*, to manifest his religion or belief in worship, observance, practice and teaching."[20]

The European Court of Human Rights has also observed that "the right of believers to freedom of religion, which includes the right to manifest one's religion *in community with others*, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention."[21]

In the context of the freedom of opinion and expression, the UDHR includes the "freedom to * * * seek, receive and impart information and ideas through any media and regardless of frontiers."[22] Such a freedom of receiving and imparting ideas necessarily implies freedom being exercised by more than one person.

A number of countries have upheld the importance of the collective exercise of individual liberties. The South African Constitution, for instance, recognizes the communal context required for the full exercise of many important human rights. It provides

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[20] ICCPR, art. 18.1, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 (emphasis added).

[21] Newman, 49 Am J. of Jur. at 160-61 (quoting *Case of Metropolitan Church of Bessarabia* v. *Moldova*, App. No. 45701/99, 35 Eur. Ct. H.R. 13 (2002) (emphasis added)).

[22] UDHR Art. 19.

that "[p]ersons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of the community," to "practice their religion" or "to form, join and maintain cultural, religious and linguistic *associations* and *other organs of civil society*."[23]

These international rights, exercised by individuals in relation to group membership or activity, offer an important complement to the collective nature of rights exercised by institutions.

### b. International human rights law protects collective rights exercised by private institutions.

Human rights instruments from other jurisdictions protect rights exercised by private institutions. The Council of Europe's 1995 Framework Convention for the Protection of National Minorities, for example, recognizes the rights of persons belonging to a national minority "to manifest his or her religion or belief and *to establish religious institutions, organizations, and associations*."[24]

Many countries have also recognized the rights of private institutions, as an agent of members, to receive protection and conduct their affairs without

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[23] van der Vyver at 101 (quoting S. Afr. Const. 1996, Art. 31 (emphasis added)).

[24] van der Vyver at 101 (quoting Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, art. 8, G.A. Res. 47/135, Annex, U.N. GAOR, 47th Sess., Supp. No. 49 (Vol. I), U.N. Doc. A/47/49 (Dec. 18, 1992) (emphasis added)).

state interference.[25] The South African Constitution has been argued as "the most advanced of all human rights instruments in affording recognition to the basic rights and freedoms of group entities such as the institutional church." van der Vyver at 91. The South African Bill of Rights states, "if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right," all juristic persons are "entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person." *Id.* (quoting S. Afr. Const., §§ 8(2) & 8(4)). Likewise, Article 19 of Germany's constitution makes clear that "[t]he basic rights apply also to corporations established under German Public law to the extent that the nature of such rights permits."[26]

The European Court of Human Rights has also recognized that protecting religious institutions is critical for the exercise of religious freedom generally. The court has noted that "religious communities tra-

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[25] One scholar has argued that the first modern formulation of this principle was articulated by a medieval Calvinist jurist, John Althusius, who proclaimed that all distinct social entities are governed by their own laws and that those laws differ according to the nature of the social institution. van der Vyver at 95-96. Dutch political scientists and legal philosophers schooled in Calvinist social theories were influential in expanding the application of private spheres of sovereignty to the interrelationships of all "structural social entities." *Id.* at 96.

[26] Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law] [Constitution], May 23, 1949.

ditionally exist in the form of organised structures," and thus the Convention "safeguards associative life against unjustified State interference." Moreover, "the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords."[27]

Protection of such institutional rights is thus justified, as both this Court and international scholars have recognized, because "furtherance of the autonomy of religious organizations often furthers religious freedom as well." van der Vyver at 97 (quoting *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 342 (1987)).

## II. The Constitution protects Officer Heffernan's right to act in concert with others.

Officer Heffernan should prevail against Respondents under both the Assembly Clause and the collective dimension of freedom of speech. Each would be separately sufficient to rule in favor of Officer Heffernan.

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[27] Newman, 49 Am J. of Jur. at 160-61 (quoting *Metropolitan Church of Bessarabia* v. *Moldova*, App. No. 45701/99, (2002) 35 EHRR Eur. Ct. H.R. 13) (ECHR)).

### A. The Assembly Clause protects Officer Heffernan's right to interact with a political campaign even if he does not share its goals.

At the core of the Assembly Clause is the principle that citizens must have a right to gather together without undue government interference. This is true even when the government does not understand or properly perceive the purpose of the gathering, or even when there is no single, official purpose common to all those attending the gathering or participating in the collective activity.

First, it should not matter whether there is some "official" purpose of the assembly in question. Some may gather to hear a Joan Baez protest concert because they strongly agree with the political message of the lyrics. Some may attend merely because they love the music. Some may go there looking to find a date. But that disunity of purpose does not mean that the government then has free rein to interfere with the gathering or that the concertgoers have waived their rights under the Assembly Clause. Put simply, the Third Circuit was wrong to suggest that associational activity is only protected through formal affiliation with a group consisting of a single unitive or "official" expressive purpose in order to enjoy First Amendment protection. Cf. *Pleasant Grove City, Utah* v. *Summum*, 555 U.S. 460, 476 (2009) (it is frequently "not possible to identify a single 'message' that is conveyed by an object or structure").

Indeed, it is often true of crucial assemblies in world history that their purpose and direction is only determined during the course of the assembly. The

delegates to the Second Continental Congress did not initially share the same objectives, nor had they predetermined their ultimate purpose in American history: the fashioning of the Declaration of Independence. Sometimes an assembly is called in order to determine a common purpose.

Since it is difficult and somewhat pointless to find out the purpose of an assembly, it should matter even less whether government officials interfering with an assembly properly perceive the assembly's purpose. Nor should the scope of protection depend on a judge's *post-hoc* decision about the purpose of the assembly. Rather, the Founders recognized that people assembling together is an activity deserving of protection, regardless of the assembly's purpose.

Here, Officer Heffernan was gathered together with members of a political campaign. The Founders would have recognized that as an assembly, regardless of their unfamiliarity with yard signs or their inability to tell whether Officer Heffernan completely shared the goals of the leaders of the political campaign. That should be enough for him to invoke his rights under the Assembly Clause.[28]

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[28] Claims under the Assembly Clause are like other First Amendment rights subject to strict scrutiny, but the interest Respondents sought to further here—the punishment of opposing political views—is not even legitimate, much less compelling.

### B. The collective dimension of freedom of speech protects Officer Heffernan's right to pick up yard signs from a political campaign even if he does not share its goals.

As we demonstrated above, freedom of speech has an inherent collective dimension. Under that collective dimension, freedom of speech extends not just to the actual speaker or a lead speaker, but also to those listening to the speaker or facilitating the speaker, even if they do not necessarily share the views of the primary speaker.

For example, on November 4, 1917, the All-Russian Central Executive Committee issued a decree giving the Bolsheviks control over all newsprint in Russia. See Tovah Yedlin, *Maxim Gorky: A Political Biography* 124 (1999). Opposition newspapers quickly folded. *Id.* Russian newsprint manufacturers or newsprint distributors might not have shared or even known the views of the Bolsheviks' political opponents, but the Soviet government violated their freedom of speech nevertheless.[29] Indeed, it was precisely because of their participation in the collective dimension of speech that the Bolsheviks targeted them in the first place.

Yet under the Third Circuit's approach, Officer Heffernan—who sought to facilitate both his mother's

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[29] See also *Minneapolis Star & Tribune* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (holding that a law singling out newspapers for a tax on paper and ink was an unconstitutional burden on expression).

speech and the speech of a political campaign—enjoyed no freedom of speech protections. Without a "political message" he intended to convey, Officer Heffernan was out of luck. Pet. App. 10a. Indeed, under the Third Circuit's misguided approach, Russian newsprint manufacturers would have been out of luck too. The Court should soundly reject this crabbed view of the collective dimension of freedom of speech.

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Officer Heffernan's travails before the lower courts should serve as a wake-up call for civil libertarians. Constitutional doctrine that is severed from the text and history of the Constitution leads to shrunken freedoms, and eventually absurd results. The Court should take the opportunity presented by this case to put freedom of assembly in particular and collective rights in general on a firmer foundation.

## CONCLUSION

The decision below should be reversed.

Respectfully submitted.

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NOVEMBER 2015